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CHICAGO TRACTION CASES.

The Supreme Court of the United States has recently decided a very important matter in regard to what was termed the Ninety-Nine Year Act, relating to privileges under ordinances granted the Chicago City Railways. The decision rests wholly upon the construction of a few phrases in the act upon which the franchises depended and which were regarded as worth in the neighborhood of $100,000,000. This ninety-nine year act declares that "all contracts and licenses made or given, and as made and amended by and between the common council and said corporation respecting the use of railways in the streets, shall be in force during the life hereof." The company's case rested wholly upon their ability to convince the court that this language meant not merely the life of the corporations, but also that their privileges under the ordinances should continue for ninety-nine years. The court said: "Corporate privileges can only be held to be granted as against public rights when conferred in plain and explicit terms. The ambiguous phrase of the act of 1865, 'during the life hereof,' does not operate to extend existing contracts for a term of ninety-nine years, or limit the right of the city to make future contracts with the companies covering shorter periods."

This opinion reverses that of Judge Grosscup, who it seems decided in favor of the companies in regard to all ordinances and franchises in existence prior to May 3, 1875, which was the date of the adoption of the cities and villages act under the Illinois constitution of 1870. He held the ninety-nine year act of 1865 extended the life of all ordinances and took away from the council the right to limit a franchise, giving it privileges which were merely administrative. This view he applied to everything until the vote at the charter election in 1875, at which time he declared the people gave back to the city council absolute control over the conditions of the street car frachises. The result of Judge Grosscup's decision would have been that all franchises passed prior to 1875 expired on or about 1958, and those after that time at the dates and on the conditions mentioned in the specific ordinances. Judge Grosscup's decision was regarded by many as an extraordinary compromise, and is not upheld by those judges of the supreme court who dissented from Mr. Justice Day's opinion in the principal case, which has not yet been reported. We hoped to have had it by this time. The judges sustaining the opinion were Mr. Chief Justice Fuller and Justices Harlan, Holmes, Peckham and White. Justices McKenna, Brewer and Brown dissented.

From the *Chicago Legal News*, of March 17th, in a communication by Mr. Edward B. Esher, it appears that Mr. William Ritchie, of the Chicago bar, in an address before the National Municipal League, at Rochester, N. Y., in May, 1901, entitled "The Street Railway Situation in Chicago," stated the exact position which the supreme court has taken. This address may be found reported in full in the printed proceedings of that session of the league. In that address Mr. Ritchie insisted that the matter was to be decided by the application of the familiar rule: "Every public grant must be construed against the grantee and in favor of the public;" and that the expression "during the life hereof" was too indefinite to satisfy that rule. Mr. Ritchie is well known to the editor of this Journal, as a lawyer of rare ability, such as would grace a judge of the United States Supreme Bench.

We hope soon to have the full text of the opinion of the court, the full effect of which cannot yet be determined.

ENGLISH AND CANADIAN CRITICISM OF THEIR JUDICIARY.

"It is somewhat strange to us," says the *Canada Law Journal* for March, "in this country to read the severe criticisms which occasionally appear in the legal journals of England on the judicial utterances and other actions of the English judges. The *Law Times*, in referring to a recent appointment describes it as 'a job' and continues: 'We are sorry to say that of recent years there has been a growing tendency to fill vacancies, even upon the bench, without regard to the great responsibilities that rest upon the nominator. Political and domestic considerations are only too often painfully conspicuous, and it is a state of things one can only deeply re-

gret.' Some of our Canadian judges would probably feel very much aggrieved, and perhaps not a little surprised, should as strong language be used by legal journals in this country as is common in England. Occasions for criticism arise here as well as there, and will continue to do so, as long as judges are only human beings. Complaints by the profession here may run in other directions from those above referred to, and will differ from time to time. At present for example, it might not be out of place to comment upon the occasional want of courtesy by a judge to members of the bar, especially junior members; lack of judicial dignity (arising sometimes from the persistency of counsel in pressing points—though this is no excuse, as he is within his right in so doing); delays in deciding cases, etc. But we refrain from comment, even those matters have been referred to in the lay press; we would merely remark that the avoidance of causes of offense, such as have been publicly stated to exist and as to which we presume there is some foundation in act, would tend to uphold, and would not impair, the noble traditions of our bench, and would increase, and not tend to destroy, the kindly and reverent feeling which the bar has for those of their number who have been appointed to preside as judges. It may be noted that as to some of the occasions on which alleged frictions have recently occurred, the matters before the court have been connected with criminal procedure. In this branch of the law it has always been recognized that a prisoner has the right to catch at any straw; and it is probably the duty of his counsel to take advantage of and present to the court any technicality or informality in the proceedings which may aid his client. Judges are appointed for the purpose of hearing such matters as these as well as any other question raised by counsel."

NOTES OF IMPORTANT DECISIONS.

CONTRIBUTORY NEGLIGENCE WHERE WANTON AND RECKLESS KILLING IS CHARGED.—In the case of Gipson v. Southern Ry. Co., 140 Fed. Rep. 410, the plaintiff's intestate was killed by a train running at an unlawful rate of speed; the servants of the company not having blown the whistle or rung the bell as the train approached a crossing where the accident occurred. The plaintiff charged that the killing was wanton and reckless or intentional. An interesting feature of this case is that it shows a situation where the question of negligence becomes one of law. In this case it appeared that there was an ordinance in force in the town of Paint Rock which forbade trains to pass through the town at a greater rate of speed than 10 miles an hour. The evidence showed that the train was going at the rate of from 25 to 30 miles an hour. There was also evidence tending to show that the bell was not rung nor the whistle blown as the train approached and entered the town. The town contained about 500 or 600 inhabitants. The accident occurred at a public crossing, which was used daily by the citizens of the town. Proof of these facts sustained the charge of negligence against the defendant corporation. It is clear, however, that the evidence was not sufficient to sustain the charge of wanton, reckless, or intentional killing. King v. Illinois Central R. R. Co., 114 Fed. Rep. 855; L. & N. R. R. Co. v. Mitchell, 134 Ala. 261, 32 So. Rep. 735. The plaintiff, therefore, was not entitled to a verdict on the counts which allege wanton, reckless and intentional killing. Plaintiff was, however, entitled to a judgment based merely on negligence, provided there was no element of contributory negligence. On this latter point the court said: "The evidence is amply sufficient to make a *prima facie* case of negligence, entitling the plaintiff to a verdict on the counts based merely on negligence, unless the evidence sustains the plea of contributory negligence. The evidence showed without conflict that the accident occurred in broad daylight; that the railroad at the place at which it occurred was perfectly straight for the distance, one witness said, of a quarter of a mile, and another witness, a half mile; and that there was no obstruction upon or near the railroad that would have prevented the deceased from seeing the approaching train. The evidence showed without conflict that the deceased was on the west side of the railroad track, and in a place of safety, and that, as the train approached, he either ran or walked rapidly towards the track for the purpose of crossing it to get to the station before the train arrived. There are three parallel tracks laid in front of the station, running at that point north and south. One of the witnesses testified that, when the deceased reached the track, he paused and looked in the direction from which the train came, and then started across the tracks, and was struck when he had made four or five steps. Another witness testified that the deceased attempted to go directly across the three tracks, and as he raised his foot to step on the main track the engine struck him. The deceased was about 70 years of age, but the evidence showed that his eyesight was good and that he was not deaf. If he looked up the road he could have seen the approaching train at a distance of certainly not less than a quarter of a mile—one of the witnesses said, a half mile. As the supreme court said, in Northern Pacific R. R. Co.

v. Freeman, 174 U. S. 384, 19 Sup. Ct. Rep. 765, 43 L. Ed. 1014: 'Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or, if he looked, he did not heed the warning, and took the chances of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence.' See, also, Railroad v. Houston, 95 U. S. 697, 702, 24 L. Ed. 542. It is true that questions of negligence are usually for the jury. It is well settled, however, that where, in an action to recover for a personal injury, all the material facts touching the negligence of the person injured are undisputed, and admit of no rational inference but that of his negligence, the question of contributory negligence becomes a matter of law only, and the court should direct a verdict. St. L.,S. W. R. R. Co. v. Purcell (C. C. A.),135 Fed. Rep. 499; Hemingway v. Ill. Cent. R. R. Co., 114 Fed. Rep. 843. It seems to me that but one of two inferences can be drawn from the evidence bearing upon the question of the deceased's contributory negligence. He either failed to look for the train and negligently walked on the track, or he looked and saw it, and took his chances to cross the tracks before the train reached him. In either case he was clearly guilty of contributory negligence."

WATERS — DAMAGE FROM BACK WATER CAUSED BY INSUFFICIENCY OF CULVERT BUILT BY RAILWAY COMPANY.—In the case of Perrine v. Pennsysvania R. R. Co.,62 Atl. Rep. 702, a point is decided which while not intricate from a legal standpoint is one which contains a principle which may often be found of practical use. In that case the defendant in error sued the company to recover the damages resulting to him from backwater in Indian Run, a stream which flowed through Perrine's land. The railroad company had dammed this stream, and had placed a culvert to carry through the embankment the water flowing in Indian Run. The plaintiff's case was rested upon the insistence that this culvert was insufficient in size and defective in structure, and that because of this water of the creek was held back and flooded plaintiff's land. The jury so found. The court in affirming the verdict of the jury said: "The single ground assigned for the reversal of the judgment entered upon this verdict is that the trial justice permitted the jury, in estimating the damages, to include the injury caused to five stacks of wheat belonging to the plaintiff below. These stacks had been placed on a knoll about 18 inches higher than the surrounding land of the plaintiff. The request to charge was that the defendant was not liable for the injury to these wheat stacks, which stood upon ground which never before was covered by water. The trial justice refused this request, but charged that if the wheat was damaged because of the smallness of the culvert —smaller than the defendant should have anticipated the needs to be—and the backwater came, and the wheat was flooded and injured as a result thereof, then he may recover what you think is proper to be allowed for that. The argument in support of this request to charge is rested upon the admission of the plaintiff, upon cross-examination, that he thought his wheat was perfectly safe on the knoll, and that he had never known that knoll to be covered by water. The argument drawn from this testimony by the counsel for the plaintiff in error is that, if the plaintiff below had no reason to anticipate that these stacks would be flooded by the insufficient culvert, the defendant could have had no reason to anticipate it. In the language of the brief, 'each party had precisely the same means of gauging whether such a storm would occur, and, if so, whether the culvert would or would not prove adequate to keep the water from the wheat stacks.' This proposition assumed, first, that the knowledge of both parties was the same; secondly, that what each was bound to know was the same; and, thirdly, that each must be conclusively presumed to have drawn the same conclusions therefrom. Now, firstly, it does not appear what the defendant knew when it built the culvert or thereafter; and as to the plaintiff it only appears that he did not know that the knoll had ever been flooded during the 13 years which had passed since the culvert was constructed. Whether it had been flooded does not appear. Secondly, there was a duty imposed upon the defendant to learn all the conditions which it reasonably could to enable it to build a safe culvert. It was its duty, when damming the run, to ascertain the character of the stream; how it was fed; how it had been affected by previous rainstorms, or was, from its topographical position, likely to be affected by floods from future rainfalls and thaws. Then it was its duty, through its engineers, to calculate the space required to carry any volume of water which could be reasonably anticipated, and then to construct a culvert with a capacity and of a design calculated to accomplish this purpose. But no duty rested upon the plaintiff to collect this information, or to make calculations, or to see that the culvert, as built, was adequate in size or correct in construction. Then, thirdly, because the plaintiff thought the knoll safe from backwater is no conclusive proof that the defendant should not have reasonably concluded otherwise. The plaintiff's opinion of the safety of the knoll was of no more importance than that of any other witness with this information and judgment. It raised no conclusive presumption that the defendant, with the knowledge it should have had, could not have reasonably anticipated that the structure, as built, would be likely to flood the knoll. The request was properly refused."

WHETHER A GRANT BY DEED OF A FISHING OR HUNTING RIGHT IS LIMITED IN ITS SCOPE TO THE CONDITIONS WITHIN THE VIEW OF, AND SURROUNDING THE PARTIES AT THE DATE OF THE DEED, OR IS TO BE CONSTRUED RELATIVE TO THE ADVANCEMENT OF SOCIETY AND THE IMPROVEMENT IN FACILITIES AFFECTING THE EXERCISE OF THE GRANTED RIGHT?

The question propounded as above for our examination and solution, we have found to be quite an interesting one, but, strange to say, one on which courts of last resort have very seldom been called upon to express an opinion. Having examined the question carefully from two view-points, we have come to the conclusion that the limitations on the implied incidentals in a grant asserted in the question as above propounded, have not the sanction of the law, either on principle or in the opinions of courts of last resort in the decision of cases involving similar questions. The two view-points from which we have reached the same conclusion (that stated in the preceding paragraph), were first: That the implied incidentals in every grant include every or any manner of use of the grant that is necessary and usual at the time such use is questioned. Second, that it would be against public policy to so limit the manner of use in a valuable grant as would preclude the appropriation of improved methods which reasonably tend to carry out the purpose of the grant.

What are the Implied Incidents to Every Grant?—The general principle underlying this subject, often quoted, was first stated in the books in Shepherd's Touchstone,[1] where, after showing that a grant and a reservation in a grant to the grantor are practically the same thing, the author says: "It is a true rule that when anything is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also." This principle as just quoted has been approved so often by the courts that no principle of law could be said to be open to less controversy. It is also well settled at the present time that an owner in fee may split up his general fee into any number of special fees. Thus, he may grant the mineral rights to one person, the water rights to another. He may grant the surface rights in fee for farming to one, for hunting to another, for timber to a third. All of these grantees would get an estate in fee, and each would be the equal of the other within the limitations of his particular grant, equal in duration of grant, equal in dignity of grant, equal in the manner and methods of use. The man who gets the surface for farming purposes, or who gets the residuary fee after the other fees have been carved out cannot say to the man who has a fee to the mineral right, "my fee is superior to yours and you must limit your use to those methods which were in use at the time you received your grant." The other could just as well reply: "My grant is the equal of yours, it runs just as long in point of time, it is just as important and valuable, and I have the same right to use improved machinery in getting out the mineral in my part of the grant as you have to use improved machinery to till the surface of the land." Would the grantee of the mineral estate have the right to come to the owner of the surface and say: "You shall not use a hay press because a hay press was not known when the grant or reservation, under which you hold the surface of the land, was made." Neither has the owner of the surface the right to say to the owner of the mineral estate that he shall not use improved methods for getting out the minerals that belong to him, when such methods are proper and usual for that purpose and are essential to the full enjoyment of his grant. When we regard this question from this standpoint, the equality of all the fees or reservations carved out of a general fee, we see readily the absurdity of the assertion by the owner of any one of the estates granted of a right to impose limitations on the methods by which grantees of other and equal estate may use or operate the estate granted to them, where such use is a proper and usual one at the time it is employed.

In a recent case not yet decided, the grant was in fee simple, to the surface of the ground for taking, killing and shooting game. The owner of the residuary estate objected to the use of improved methods for hunting game. His objection, however, was

[1] p. 100.

clearly untenable. The parties to the grant did not attempt to say how the grantee should use his land, that being a matter of detail which was left to the owner of the right granted, and his heirs and assigns forever. The right granted was a right to hunt and shoot game; it was a grant of the surface of the land for that purpose; it constituted an estate in fee to the soil for the purposes stated, and the grantee and his heirs under such a grant must be held to have the right to use the surface of the land in any manner reasonably calculated to furnish full and proper enjoyment of his right. In this particular case the "hunting estate" was carved out first; it was an estate in fee simple; it carried with it every right that attends any other estate in fee simple; and the grantee had just the same right to carry out the purposes intended by his grant by improved methods, as the owner of the residuary estate had to use improved methods to exploit the other rights in the soil not otherwise granted.

Authorities sustaining our conclusion are not numerous, but are in point. Thus in the case of Clap v. Draper,[2] A granted to B certain land, but reserved for himself and his heirs all trees and timber on a certain close. The court said: "The effect of this reservation is that the grantor conveyed the close to the grantee in fee, reserving to himself an inheritance in the trees and timber, not only then growing, but which might thereafter be growing in the close. This is the natural effect of the grantee's agreement that the grantor and his heirs should have all the trees and timber standing and growing on the close forever, and not merely those then standing, or which should be standing within a limited time, and of a perpetual license to cut and carry them away. The plaintiff, having all the estate in the trees, timber and close, which the grantee had after the execution of these two deeds, he has an inheritance in the trees and timber, with an exclusive interest in the soil so far as it may be necessary for the support and nourishment of the trees." So, also, in the principal case the grantor gives to the grantee an estate of inheritance in the soil for the purpose of shooting game. Without the right to use the soil to perpetuate, protect and improve the enjoyment of his right to shoot and hunt game his grant would become valueless, a result which every court in construing a grant should seek to avoid.

So also, in Simmons v. Cloonan,[3] the rule is laid down that the appurtenances which pass with a grant are not limited to those absolutely necessary to the enjoyment of the right or property conveyed; it is sufficient if full enjoyment of the property cannot be had without them. The importance of this rule is seldom observed. A grants B the right to "shoot, take and kill" wild fowl and other game in and upon certain real estate and upon any lakes, etc., to have and to hold the same unto the said B, "with right of ingress and egress appurtenant to his heirs and assigns forever," or to do anything else on the surface of the soil, as the right to fish, etc. The bare grant is to take, shoot and kill with right of ingress and egress. However, it is a grant and not a mere easement appendant to some other estate and has the same appurtenances and implied incidents which attach to the residuary estate. What are these appurtenances? Not merely those things that are absolutely necessary to the bare requirements of the grant, but everything which reasonably tends to a full and perfect enjoyment of the thing granted. The hunting or fishing estate being co-equal in dignity with the residuary estate has the same right to perfect enjoyment of the estate granted. In the case just cited A conveyed to B a mill, run by steam power. The court held, however, that the right to run the mill by water, which had been abandoned, was one of the incidentals which passed with the grant and that the grantee was not confined to the method in use at the time of the grant. In Rood v. New York R. R. Co.,[4] it was held that where one grants a strip of land to a railroad, he grants also the implied right to run engines over the land and the right to emit sparks, and cannot hold the railroad liable for fire resulting from sparks. The court said: "It is a well known and reasonable rule in construing a grant that when anything is granted, all the means to attain it, and all the fruits and effects of it are granted also."

[2] 4 Mass. 266.

[3] 81 N. Y. 557.

[4] 18 Barb. (N. Y.) 80.

In St. Anthony Power v. Minneapolis,[5] the court held that a grant of a mill site carries with it a right to maintain the dam by erecting another dam, called a "wing dam," which subsequently becomes necessary by the recession of the river. The application of the case last cited is very important as well as very apparent. Suppose that the hunting, fishing, or mining rights granted were, at the time of the grant, fully enjoyed by merely going upon the land and shooting and taking the game, fish, or minerals. Subsequently, however, conditions change; game and fish become scarcer and more difficult to find; poachers increase and make serious inroads. These things tend to endanger the grant as the recession in the river tended to endanger the grant of the millsite in the case cited, and, as in the case cited, the grantee of the mill site was given the right to erect a "wing dam" to protect his right, so also, the grantee of a hunting or fishing estate is entitled to protect the right granted by the erection of huts for the care of men to prevent poaching, and the building of blinds and decoys and the appointment of times and places for shooting, feeding and caring for the game. In both cases the improvements pointed out were and are absolutely necessary to the full enjoyment of the thing granted.

The English authorities are likewise clear in sustaining to the utmost the principle laid down in Shepherd's Touchstone, and quoted, *supra*. Thus in Goold v. Great Western Deep Coal Co.,[6] it was held that where A possessed the right by grant to work one of the upper gales "of a coal mine and B had allotted to him a gale or tract in which were veins of coal underlying those of A, B had the right of sinking a shaft through A's allotment to work the lower vein." The court said: "It is settled law that not only as between the crown and a subject, but also as between subject and subject, the reservation of a right implies the means of enjoying it." In Hodgson v. Field,[7] Lord Ellenborough in a very long opinion upholds the right of one who is granted a right to construct a "slough" or drain on another's land to make improvements and repairs to such drain so that it shall continue to fulfill the purpose for which it was constructed.

[5] 41 Minn. 270.
[6] 12 L. T., N. S. 842.
[7] 7 East, 613.

The case of Dand v. Kingscote,[8] is quite accurately in point with the principle involved in this article. In the case cited A granted to B in the year 1630 the fee in certain farm lands in the manor of Amble, reserving, however, out of the grant "all mines of coal and coal rights within the territories granted, together with sufficient way-leave and stay-leave to and from said mines, with liberty of sinking and digging : its." The two rights thus created in these lands passed into many and different hands until in 1879, the then owner of the mining rights attempted to use them and in their use to employ the modern methods for mining coal. He attempted to put a steam engine for hoisting at the mouth of the shaft and began to lay a railroad over the usual right of way to convey his coals to the sea. The then owner of the surface objected to what he considered an extra burden upon his fee and insisted that the grantee of the mining rights and his assigns and successors were only entitled to mine coal with the primitive means and methods employed at the time of the grant in 1630, when a steam engine or a railroad were unknown, and he attempted to enjoin the possessor of the mining right from making the contemplated improvements. The court held that the use of the mining right was not to be confined to such methods only as were known at the time the grant was made. The court held also that the liberty of sinking pits included all proper accessories as incident thereto, such as the erection of a steam engine, and other machinery for the purpose of drawing them. The court held also that plaintiff might build a railway to convey his coals to market, if that was necessary to a reasonable use of his grant. It will not be unprofitable before quoting the opinion of the court in this case to cite extracts from the brief of Mr. Addison for the defendant. Mr. Addison, in his brief, said: "The real question in this case is one of construction, viz., what was the intention of the parties in making this reservation. In deciding what has been reserved. the court will look to all the circumstances, and construe these deeds *secundum subjectam materiam*. Now, there are very extensive coal mines reserved by these deeds, and a right of way sufficient for

[8] 9 L. J. Exch. 279.

the enjoyment of those mines. As incident to that whatever is necessary for the fair and reasonable enjoyment of the grant is reserved. That is the general principle which is to be found in Shepard's Touchstone. See also, Roberts v. Karr, 1 Taunt. 495; Morris v. Edgington, 2 Taunt. 24; Hodgson v. Field, 7 East, 612; Abson v. Fenton, 1 B. & C. 195; Earl of Cardigan v. Armitage, 2 B. & C. 197. In the last case the court said: 'The question is, whether, under this general grant for the purposes of carrying coals, the party has not a right to make any such way as is necessary for the carrying of that commodity? There are no great collieries in the nothern part of the kingdom where they have not those framed wagon ways; and the case itself expressly states, that the defendant cannot so commodiously enjoy this way in any other manner. Therefore, under the original grant he has a right to make a framed wagon way along the slip of land in question, which is necessary for the purpose of carrying his coals.' The description of the wagon way there mentioned had come into use since the date of the grant in that case."

Baron Parke delivered the opinion of the court in the case of Dand v. Kingscote.[9] He said: "The trespasses complained of are first the making of a steam engine and pond for supplying it, and engine-house and buildings; secondly, the making of a formed railroad track of iron, on stone pillars to form an outlet for the product, and the construction of embankments, and cutting the soil, in order to make a level railroad. First, as the coal in all the seams are exempted and a right to dig pits for getting these coals reserved, 'all things that are depending on that right and necessary for the obtaining it' are reserved also, according to the rule in Shepherd's Touchstone, 100. Consequently, the coal-owner had, as incident to the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines and draw the coals from the pits. The evidence shows that the steam engine which was erected was necessary for the mining and working the lower seams, which are the principal seams in that coal field; and therefore the defendant had a right to erect it. The pond for the supply of the engine house, seems to have been a necessary accessory to such an engine and was, therefore, lawfully made; but whether the sheds were, is not stated; and if there be a question as to them, the arbitrator may determine it. We shall now ascertain whether the railroad was constructed in a direction or in a manner unauthorized by the reservation. This reservation is to be construed according to the rule laid down in Shepherd's Touchstone, 100, in the same way that a grant by the owner of the soil of like liberties, for what will pass by words in a grant, will be excepted by like words in an exemption. Now, the reservation is of the right to dig pits and of sufficient wayleave. There is no doubt that the object of the reservation is to get the coals beneficially to the owner of them, and, therefore, it should seem that there passes by it a right to such a description of way leave and in such a direction, as will be reasonably sufficient to enable the coal owner to get from time to time all the seams of coal to a reasonable profit; and therefore the owner is not confined to such description of way as is in use at the time of the grant, and in such direction as is then convenient. Adopting this rule of construction the question is, whether the direction or mode of construction of the railroad were reasonably sufficient, for the purpose of getting the third seam of coal in a manner beneficial to the coal owner. Upon the facts in this case we have little difficulty in determining these questions satisfactorily. It is found that without a railroad for shipment, the lower seams could not be worked without loss; and that 30,000£ was expended on the steam engine, etc., and that for that expenditure there could be no adequate return, unless by the profits of an export trade. If it is meant that this sum was necessarily expended in order to work the lower seams in a reasonably beneficial manner, and therefore that a railway for shipment was necessary for the fair working of those seams, we cannot say that there has been anything improper in the direction or mode of construction of the railway. The direction was proper, in constructing a railway for shipment, inasmuch as it was convenient for the purposes of the coal mine, which was the meaning of the reservation, and which is the only thing to be looked to in construing it. Nor upon the supposition that a railway for shipping was necessary, can we say that there was any excess in the mode of construction;

[9] *Supra.*

for the case finds, that the railroad has been judiciously designed and constructed and that no necessary ground has been taken, or injury done in making it."

It is evident that on the question of proper construction of a fishing or a hunting grant, the words to "take, shoot and kill" game or fish include as incidental to the rights thereby conveyed whatever is essential or whatever in the future becomes essential to a reasonable enjoyment of the right to "take, shoot and kill" game. If game cannot be successfully taken without "blinds and decoys" the grantee may build them in order to secure the enjoyment of his right. If it can be shown that poaching makes serious inroads on the grantee's right to take, shoot and kill the game on the territories granted, the grantee may build houses for men to guard his rights if it is further shown that that is a reasonable method to prevent poaching and is the usual method now employed on similar estates for that purpose. If it can be shown that the game on the preserve are because of the advance of civilization being driven away or compelled to leave because of the lack of sustenance in the vicinity and that unless the game is fed it will not stop on or frequent the estate granted, the grantee certainly has the right to feed the game and do everything that is reasonably necessary to prevent the extinction of the game and to make the place an attractive rendezvous for their visitations. The methods employed for these purposes are of little consequence, so long as they are reasonably necessary for the protection of the rights granted. The difference in methods or of conditions existing at the time of the grant and later, is not a question for discussion, as the grantor is presumed to have intended by his grant that the grantee shall at all times, during the existence of the grant, have full and complete enjoyment of the thing granted and to meet new conditions as they arise with new methods of operation if reasonably necessary to a proper enjoyment of his grant.

Question of Public Policy.—The question of public policy might be said to be also involved to some extent. The general rule is thus stated in 13 Cyc. 686: "Conditions or restrictions affecting the use or occupation of property should not be against public policy or prohibit any reasonable use in conformity with the title granted." In other words the law first presumes that where an estate is granted the grantor intends that the grantee shall enjoy his estate and where no restrictions are imposed, the grant will carry with it as incident thereto, every right, appurtenance or privilege that is necessary to a reasonable enjoyment of the thing granted. The courts do not strictly construe a grant; rather do they strictly construe any unreasonable restriction upon the use of the said grant. Thus, public policy would certainly forbid that a grantee should be prevented from using any improved methods of operating or using his grant. Such a restriction would be against public policy and void. Certainly if such a restriction expressly inserted in a grant is, in any case void as against public policy, the courts will not, in the absence of any such express restriction, imply such a restriction into the terms of the grant.

The most recent authority illustrating this principle is to be found in the decision of the court in the case of Wiggins Ferry Company v. Chicago & Alton R. R. Co.[10] In this case the plaintiff ferry company granted the defendant railroad a strip of land along the eastern shore of the Mississippi river opposite to the city of St. Louis, known as Bloody Island, as a rendezvous for its trains and for the erection of stations, freight houses, etc. The contract further provided, however, that the railroad company would "always employ the said ferry company to transport across the river all persons and property taken across, to, or from the railroad," and that "no other than the Wiggins Ferry Company should ever be employed by the said railroad company to cross any passengers or freight coming or going on such road." The court held that the contract did not prevent the railroad company from carrying freight and passengers over the river by means of a bridge afterwards constructed, but merely prohibited it from employing any other ferry company in transporting them. The court further held that a construction of the contract that it prevented the use of the bridge by the railroad company for the transportation of freight and passengers, would render it contrary to public policy and void.

Certainly, if a court will declare an express restriction as to the use of improved methods in a grant contrary to public policy (even

[10] 128 Mo. 224.

though such restrictions are imposed in a grant to a *quasi*-public corporation), it will certainly not imply them in a grant which is silent on the methods to be employed. It is certainly the policy of the law to encourage the invention and adoption of all improved methods of industry in every one of its branches and to lay down a rule that all grants, reservations and contracts shall be construed, as to the methods that may be employed to carry out the contract or enjoy the thing granted or reserved to those methods and uses known at the time of the making of the grant or contract, would act like a wet blanket upon all progressive industry, and smother all ambition and effectually block the wheels of progress in all lines of legitimate endeavor. That any court in America would lean toward or even consider for a moment such a rule of construction, would be preposterous, yet such a rule has been seriously suggested by lawyers in not a few *nisi prius* cases that have come to the writer's attention. The mere statement of such a construction is to a man familiar with American institutions and principles the most effectual argument to prove its absurdity.

ALEXANDER H. ROBBINS.

St. Louis, Mo.

NUISANCE—RECOVERY OF DAMAGES FOR DIMINUTION IN RENTAL VALUE.

MILLER v. EDISON ELECTRIC ILLUMINATING COMPANY.

New York Court of Appeals, February 6, 1906.

An action in equity to enjoin a nuisance and for damages will not fail because of the discontinuance of the nuisance *pendente lite*, but the court will retain jurisdiction to award such damages as are recoverable.

Where premises alleged to be damaged by a nuisance are leased, while the reversioner can recover such damages as are of a permanent character, damages for diminution in the rental value during the term of the lease can be recovered only by the tenant in possession.

The plaintiffs by the institution of this action have sought to restrain the defendant from continuing a nuisance, created through the maintenance and operation of a plant for the supply of electric light and power, whereby their property in neighboring dwelling houses has been injuriously affected. They further demanded judgment for damages already sustained. The property was in the occupancy of a tenant holding under a lease by the plaintiffs. The trial court formulated its decision in findings of facts and conclusions of law, and the judgment recovered by the plaintiffs thereupon was affirmed by the appellate division. The facts found, so far as they need to be mentioned, show that the plaintiffs became the owners of the premises in question some years prior to 1888, in which year the defendant constructed upon premises adjacent to those of the plaintiffs a power house, equipped with machinery and appliances necessary for the purpose of generating electricity to be supplied to the public for lighting or for power. In 1890 the plaintiffs leased their property for a term of five years, receiving a rental of $15,000 a year and certain privileges. Shortly prior to the expiration of the term of this lease the premises were again leased to the same tenant for another term of five years from May 1, 1895, at the rental of $12,000 a year, with the reservation of the same privileges as in the previous lease. In 1900 the premises were again leased at a less rental, with the reservation of some additional privileges, and with a right to the lessors to share in the profits of the hotel business conducted by the lessee. After the construction of its power house the defendant's operations caused "soot, cinders, ashes, steam or water condensing from steam" to be discharged upon plaintiffs' premises. Noises, jars and vibrations resulted from the operation of the machinery which impaired the peaceful enjoyment of the premises and affected their rental value. The court further found that, as the machinery was used at the time of the trial, no injury was being worked to the plaintiffs' property, and "that it was improbable that it would be so used as to work injury in the future," but that, as the plaintiffs were entitled to the equitable relief prayed for when the action was commenced, the court would retain the case and award to them their damages. Judgment was directed for the plaintiffs for such damages in the amount of $4,500. The court decided that the plaintiffs failed to establish that they suffered any damage after the year 1900, and, though the rental for the premises reserved to them in the new lease of that year was less than that for the prior term, the difference could be accounted for otherwise than by charging it to the defendant's acts. This was explained in the changed character of the locality and in the fact that the lease not only provided that the plaintiffs should have a share of the profits, but that they should enjoy greater privileges than formerly. These findings of the trial court have sufficient support in the evidence.

CULLEN, C. J.: I adopt Judge Gray's statement of facts and I agree with him in the position that this action was properly brought in equity; that it was triable by the court, and that the defendant was not entitled to a jury trial as of right. I am unable, however, to concur in the view that the plaintiffs were properly awarded

damages for diminution in the rental value of the property. The plaintiffs were in possession of the premises during no part of the period for which damages have been recovered, but the same were in the occupation of their tenants under a lease for a term of years. One of these leases expired during the existence of the nuisance, and, as the trial court has found, by reason of the nuisance the plaintiffs were compelled to rent the premises for a new term at a reduced rent. It is for this loss of rent that damages have been awarded. The question as to which party, the landlord or his tenant, is entitled to recover for depreciation of the rental value by the existence of a nuisance has involved the courts in much perplexity. In the elevated railroad cases it has been settled that in the case of a lease made after the erection and operation of the railroad the landlord, not the tenant, is entitled to recover for such depreciation. Kernochan v. N. Y. Elevated R. R., 128 N. Y. 559. In the Kernochan case there is an elaborate discussion of the question by Chief Judge Andrews. A careful analysis of the opinion of the learned judge will show that the decision proceeded on the ground that the elevated road was a permanent structure and intended to be so maintained; that it was constructed in the street under legislative authority, and that as ample authority was granted to condemn any property rights on which it might trespass the lessor had no absolute remedy to compel the removal of the structure, since the right of condemnation can at any time be exercised by the defendants." The learned judge said: "It is also a necessary deduction from the circumstances attending the making of ordinary leases of improved property, executed after the construction of the elevated railroad, that the right to recover damages is vested exclusively in the lessor." To the doctrine of this case the court has steadily adhered. When, however, the doctrine was invoked to defeat the right of a tenant to recover damages against the present defendant for the very same acts which constitute a nuisance in the case now before us, it was held that the rule in the elevated railroad cases did not apply. In Bly v. Edison Electric Ill. Co., a tenant, hiring after the nuisance was created, recovered the depreciation in the rental value of the premises. The appellate division, citing the authority of the Kernochan case, reduced the award to a nominal sum, holding that the tenant was not entitled to recover diminution in rental value. 54 App. Div. 427. On appeal to this court the judgment of the appellate division was reversed, though a new trial was ordered because the trial court had awarded damages for a period anterior to six years before the commencement of the action. 172 N. Y. 1. This court said, per Werner, J.: "We think the Kernochan case has no application to a case like the one at bar, and this without reference to the fact that it appears affirmatively that the rental paid by the plaintiff was the same during the existence of the nuisance as it was before. The elevated railroad cases to which class the Kernochan case belongs, are *sui generis*. They are governed by the principles which apply to no other class of cases." The elaborate discussion of the question by Judge Werner leaves nothing to be now added. It is sufficient to say that that case expressly held that a tenant under a lease made during the existence of the nuisance was entitled to recover the depreciation of the value of the occupation of the premises.

It is said to be the settled rule of law "tha where the wrongful act affects different interests in the same property the owner of each interest may have his separate action against the wrongdoer. Landlord and tenant have separate actions, and each, if injured therein, may have redress, the one for the injury to the reversion, the other for the injury inflicted in diminishing his enjoyment of the premises." This statement is doubtless correct, but under this rule "to entitle a reversioner to maintain an action, the injury must be necessarily of a permanent character, and that a presumed intention to continue the nuisance is not sufficient, even where there is evidence that the premises would sell for less if the nuisance were continued." (Mott v. Shoolbred, opinion of Sir George Jessel, M. R. 20 Eq. Cases, 22; see also cases cited in Judge Werner's opinion). Here the only injury found by the trial court is to the enjoyment and occupation of the premises. That does not affect the reversioner. Had the trial court found that the operation of defendant's light plant cracked the walls or injured the structure, such damage would be of a permanent character and the reversioner entitled to recover. In the present case, however, not only is there no permanent injury to the plaintiffs' buildings, but the defendant's plant did not constitute the nuisance, but its operation, and such operation was not necessarily or inherently injurious, because the trial court found that at the time of the trial its operation did not damage the plaintiffs. Judge Andrews said in the Kernochan case: "We should be very reluctant to make a decision which would expose the defendants to a double action in cases like this," and I imagine that the reluctance still continues. Nevertheless, if the judgment before us is affirmed the defendant will be subjected to a double recovery against it, for under the Bly case the tenant is also entitled to recover, if in fact he has not already recovered, the diminution in the rental value during the same period for which the plaintiffs are awarded damages for such diminution. It is not a case like that suggested where the same act has caused injury to different persons and each recovers for the injury to himself, but here two parties will recover for exactly the same injury. I may suggest this further distinction between the elevated railroad cases and that of a casual temporary nuisance. In the Kernochan case the defendant, upon satisfactory compensating the landlord, could continue the operation of its road

despite the complaint of his tenant. Here no release from or settlement with the landlord could have prevented the tenant from restraining the operation of the defendant's plant. Moreover, the care by the plaintiffs was for a term of years. The right of the tenant and landlord then became fixed and the damage to the plaintiffs at once. It was the diminished rent during the demised term. Had the defendant ceased the operation of its plant the day after the lease the plaintiffs' injury would have been as great as if it had maintained the operation during the whole demised term. Yet I apprehend no one will contend that the defendant would have been liable for the whole period. But if we should assume that such a contention would be well founded the result would be that the day after the lease the operation of the plant might be stopped at the suit of the tenant and yet the defendant remain liable to the landlord for the loss of rent for the whole term of the lease. In other words, the defendant's liability would depend not on the injury done by its trespass or nuisance, but on the manner in which the owner might deal with his property. The decision in the Bly case did not pass this court without discussion. On the contrary, there was a vigorous dissent by Judge Haight (concurred in by two other members of the court), who contended that the loss in rental value went to the landlord, not to the tenant. The force of this position was appreciated by the majority of the court which, when it decided that the court could recover for that loss, substantially decided that the landlord could not.

I think the judgment should be reversed and a new trial granted, costs to abide event.

NOTE.—*Nuisance—Diminution of Rental Value.*—The above opinion was dissented from by Mr. Justices Bartlett, Haight and Gray, Mr. Justice Gray writing the dissenting opinion. We consider the reasoning in the dissenting opinion clearly the soundest. Mr. Justice Gray says: "In my opinion, the right of the plaintiffs to bring and maintain this action is clear and the defendant's appeal cannot be sustained. The plaintiffs were shown to have been injured by the defendant's acts in the depreciation of the value of the property, as shown by the diminished amount of the rent for the premises reserved by the lease of 1895. For the prior term of five years from 1890, they had been receiving $15,000 a year as rent, while for the succeeding term of five years, from 1895, they were to receive only $12,000 a year. That represented a total loss to the owner of $15,000 for the new term and furnished a basis of injury, upon which this action was commenced in 1898.

I consider it to be a settled rule of law that where the wrongful act affects different interests in the same property the owner of each interest may have his separate action against the wrongdoer. Lessor and tenant have separate estates, and each, if injured therein, may have redress—the one for the injury to the reversion, the other for the injury inflicted in diminishing his enjoyment of the premises. This rule and its reasons have been heretofore discussed with such care that I deem it necessary only to refer to the recent cases of Kernochan v. N. Y. Elevated Railroad, 128 N. Y. 559; Hine v. Same, *Ib.* 571; Kernochan v. Man. Ry., 161 *Ib.* 345, and Bly v. Edison Electric Ill. Co., 172 *Ib.* 1. If it be a nuisance, which is the subject of complaint as injuring adjacent property interests, the question is, when the owner not in possession sues, whether it has diminished the rental value of his property, the difference in that respect being the measure of his right to damages. When the tenant sues, his right to recover rests upon the ground that his occupancy is disturbed and the full enjoyment of his possession of the premises is prevented by the common nuisance. Francis v. Schoellkopf, 53 N. Y. 152; Hine v. N. Y. Elevated Railroad, *supra*; Bly v. Edison Electric Ill. Co., *supra*. In the Bly case the question discussed was that of the tenant's right to maintain an action to abate a nuisance and for damages, when in under a lease made during the existence of the nuisance. It was held, upon a careful review of the authorities, in effect, that as there was no justification for the maintenance of that which was a nuisance, and hence an unreasonable and a wrongful use by the defendant of its property, the tenant of the property injuriously affected was not deprived of the right to bring an action by reason of having acquired the lease thereof during the existence of the nuisance at a diminished rental. The right to have compensation for injuries actually sustained and to have the nuisance abated could not thereby be affected. It was upon that proposition that the judges of this court divided in opinion. As to the right of the owner of property, though not in possession, to maintain an action to restrain the continuance of a nuisance which threatens injury to his reversionary rights and to recover for any damage which he may be able to show that he has already sustained in that respect, I think there should be no doubt. It is argued that as the nuisance arises from the method of defendant's operation of the power house, presumptively, it is but casual and temporary. That is to say, though the defendant's building and mechanical plant were permanent structures, the operation of the machinery in a way intolerable and injurious to others, as complained of, could not be presumed to continue. Assuming the correctness of the proposition, how does it affect the principle upon which the legal right of the plaintiffs was founded? They certainly had the right to protect their reversionary interests against injury. A casual or temporary trespass or nuisance, if the latter is of a casual nature, it is true, usually affects the possession of the property, and, therefore, gives a right of action to the lessee. But for a wrongful act, which diminishes the rental value of the property, and which, from the circumstances, may fairly be regarded as likely to continue, whether it be in the nature of a trespass or of a nuisance, an action will lie by a reversioner to redress the wrong, although the lessee may equally have his action to redress the wrong inflicted upon his right to peaceable and comfortable possession. See Kernochan Case, 128 N. Y. 559, 566, and the English cases cited in the opinion, as well as the Bly case, *supra*. In this case the rental value of the plaintiffs' property, when the second lease was made in 1895, was diminished to the extent of $3,000 a year, under conditions of lease similar to those of the preceding, and, according to the findings of the trial court, the damage to the plaintiffs from defendant's operations only ceased to be inflicted in 1900. Thus the defendant's use of its power house in a way injurious to others had continued for many years after its construction. It had so seriously affected the rental value of the plaintiffs' property as to compel them to accept a reduced rental in 1895 for a further

term, and when this action was commenced in 1898, the threat in the situation was the same. However, technically, the nuisance may be termed casual, as caused by the methods of the defendant in operating its power house, it was a very real menace to the plaintiffs' interest as property owners. The case, in my judgment, came within the established rule which allows an action to a lessor whose reversion is injuriously affected to abate the nuisance by restraining its continuance. To say that the nuisance was a casual or a temporary one is an answer no more satisfactory than it is complete legally to the statement of the owners that they had suffered injury in the past by its maintenance and would suffer in the future unless it was enjoined.

It is further argued that as the plaintiffs failed to make good their ground to equitable relief by proving that the nuisance continued to exist at the time of the trial the court should not have retained the action, but should have dismissed the complaint. It is, however, well settled that when a court of equity has gained jurisdiction of a case its jurisdiction is not affected by subsequent changes in the condition of the parties, if any cause of action survive; it may retain the case generally to do complete justice between them by awarding that measure of relief for the injury done which the case admits. The jurisdiction depended upon the situation at the commencement of the suit with respect to the right to equitable procedure and relief, but the measure of the relief would be regulated by the situation at the time of pronouncing the decree. Lynch v. Metr. Elevated Railroad, 129 N. Y. 274; Van Rensselaer v. Van Rensselaer, 113 *Ib.* 207; Madison Ave. Baptist Church v. Oliver Street Baptist Church, 73 *Ib.* 82. The trial court, therefore, committed no error in retaining the cause for the purpose of awarding damages."

All the judges concur in the opinion that the action was not triable as of right by a jury. The majority opinion loses sight of a principle of law that is recognized in measuring damages as well as generally that all reasonable presumptions will be taken in favor of a party injured and against the party committing the wrong, therefore, if a wrong existed to the damage and annoyance of parties the presumption would be that it would continue to exist unless evidence of a substantial quality were introduced to show that it would not. With this principle in view there ought to have been little trouble in determining that the minority opinion is right. A court ought not to assume that an absolute injury resulting, as in this case, might not continue. It is in existence; it has continued since the complaint; and the law ought, in face of such circumstances, to aid the remedy against the wrong doer, and in measuring the damages, assume that it would continue unless the contrary were made clearly to appear. In the principal case this was not made to clearly appear. The damages were estimated upon a proper basis, that is to say, upon what the property rented for before the nuisance began and the depreciation in the rental value caused by its continuance, and the judgment of the lower court should have been sustained. The right to the tenant was entirely different. What right would the tenant have to recover for the injury to the rental value when his occupancy under a lease was the injury he suffered? It would be a strange piece of reasoning to say that since, on account of the injury inflicted by the nuisance, A is compelled to rent his property for less than he got for it without the nuisance, that he suffered no distinct and separate loss from that of the tenant who might occupy the premises under a new lease at a less amount of rent. The law is made not only for the purpose of commanding what is right, but to prevent wrong. To prevent wrong it sets salutary examples by bringing to its aid every reasonable intendment against the wrongdoer, therefore, its presumptions are against the wrongdoer. In a case like that under consideration, it should compensate the tenant for the annoyance caused, and the owner for the injury to the rental value upon the grounds set forth in the minority opinion.

JETSAM AND FLOTSAM.

LORD BROUGHAM.

The new number of *Judicial Review* contains an interesting appreciation of Lord Brougham by Mr. Loveat Fraser. Lord Brougham exasperated his contemporaries—even the most ardent friends of reform, like Sydney Smith and Macaulay—by his aggressiveness and self-assertion. "There goes a carriage with a B outside and a wasp inside" said Sydney Smith as Brougham drove by. He thought he knew everything and could do everything better than other people. Greville of the Memoirs gives some amusing instances. Buxton, the great brewer, was entertaining a number of notabilities at his brewery, and there were people in attendance ready to show and explain everything, but Brougham took it all into his own hands and explained the mode of brewing, the machinery, even the feeding of the cart-horses. Another time, on a visit to the British Museum with some friends, the officials were there, but Brougham would not let anybody explain anything, but did all the honors himself, minerals and stuffed animals included. Omniscience was his foible; but what an encyclopædic genius he had—what an elemental force he was! Think of him as an orator, with the finish of a Sheridan and the fire of a Demosthenes; think of him as a statesman, the protagonist of the reform bill; as a scientist; as a writer—the mainstay for years of the *Edinburgh Review*; as the pioneer of popular education, of free libraries and cheap editions. Last, not least, think of him as the great law reformer—greater, because more practical than Bentham. Listen to his noble aspirations. "It was the boast of Augustus that he found Rome of brick and left it of marble; but how much nobler will be the sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the heritage of the poor; found it the two-edged sword by craft and oppression, left it the staff of honesty and the shield of innocence." It has not quite come yet, but it upholds an ideal for which we may well be grateful.—*The Law Journal.*

VALUE OF EXPERT TESTIMONY.

While the jury was perspiring over the solution of a personal injury case, lawyers and judge fell to talking over what an expert knew and what he didn't know of anatomy. "What some of 'em don't know would fill a half dozen Carnegie libraries," remarked A. D. Risdom, one of the veterans of the bar. "Some years ago, when I happened to be 'the state of Missouri' in these parts, the sheriff brought to Kirksville one Jim Mays of Morrow township, for murdering a peddler up his way. Jim wasn't exactly an angel and

at first glance it looked like they had settled on him for the guilty party on general principles.

"The peddler had suddenly disappeared from Jim's neighborhood, and of course Jim killed him, they said. There were vague rumors of another man having met a like fate at Jim's hands, and as the suspect didn't go to meetin' and wash his face every day it looked like a ready-made case, only waiting the rope. Jim swore by all the gods he knew that he hadn't killed any peddler, but of course a man will talk wild when it is to his interest.

"I gently hinted to the irate community that a little more evidence would be appreciated, not necessarily for publication, but as a sort of guarantee of sincerity. About that time word came to me that a certain fellow had heard a confession from Jim, after seeing him burn the peddler's body. I went up into the township and had a talk with this very important witness. He said Jim confided to him that he had killed the peddler for having tried to cheat him and that he began burning the body one day and stayed with it all night till everything was consumed but the bones.

"I gathered up a basket of the bones and brought 'em to town. The doctors here said they had once been the skeleton of a man. The grand jury insisted on returning an indictment, but I got them to hold off for a day or two. I sent two of the bones to physicians in Chicago whom I was personally acquainted with, and related the circumstances. In due course the box came back and I opened it before the jury. Inside was the report. It said in Latin where they belonged on a horse, with the added opinion that it was a scrub.

"Jim begged the bones of us and sent them around to the doctors who declared they were of human origin, with a note of congratulation. I didn't blame him much, as their opinion might have cost him his life. Two years later the peddler came back to this county, and I told him what had happened. He said that he was extremely sorry, and if his conduct had made Jim's wife a widow he would have given her a couple of the best black-bordered handkerchiefs he had in his pack."

DELAY IN THE ENGLISH COURT OF APPEAL.

"More than half the term has gone," says the *Solicitor's Jonrnal*, of London, England, "and the court of appeal has made but little progress with its lists. On the king's bench side there are seven appeals which have stood for hearing over a year; there are twenty-two others which were entered more than nine months ago. Is it too much to hope that the new lord chancellor will make some attempt to put an end to this scandalous delay? The act enabling the court to sit in three divisions has, so far, proved a dead letter. Lord Loreburn is too busily occupied with his parliamentary and judicial duties in the house of lords to sit in the court of appeal, and Lord Halsbury, who, as an ex-lord chancellor, is an *ex officio* member of the court, gives to the house of lords and the judicial committee all the judicial service that can be expected of him. If Lord Alverstone and Sir Gorell Barnes, the other two *ex officio* members of the tribunal, were to sit in the court of appeal, the business of the king's bench division and of the probate and admiralty division would be seriously interfered with, and the remedy might prove worse than the disease. Only in one way can any real improvement be made, and that is by an increase in the number of judges."

Is it too much to hope that the conditions in England, which are spoken of in the *Solicitor's Journal* as "scandalous," may be attained in our own state and federal courts? Just think of it, nine months a "scandalous" delay, while in many of our own courts three years is not by any means uncommon. In some of our courts it is true that, cases may be heard within a reasonable time. If we could be sure always of a hearing within nine or twelve months would we not hail the day and celebrate it?

LINCOLN THE LAWYER.

It is conceded by all his contemporaries that Lincoln was the best all-round jury lawyer of his day in Illinois. Undoubtedly his knowledge of human nature played an important part in his success. He possessed another quality, however, which is almost, if not quite, as essential in jury work, and that is clearness and simplicity of statement. * * * His logical mind marshaled facts in such orderly sequence, and he interpreted them in such simple language, that a child could follow him through the most complicated cause, and his mere recital of the issues had the force of argument.—*April Century.*

BOOK REVIEW.

SCOTT ON QUASI-CONTRACTS.

Cases on *Quasi*-Contracts, edited with notes and references by Professor James Brown Scott, Professor of Law in Columbia. It is refreshing to turn from the courts which are constantly demanding cases on "all fours," to so many new works which are attending more and more to fundamental principles. Many persons suppose the case system, used in some of our law schools, tends to promote the development of what has come to be known as a case lawyer or a case judge. This is far from being true. The question as to which is the better system of teaching principles, is one that has developed, on the one hand, those who advocate the text book system, and on the other those who regard the case system as the better. That is to say, the advocates of the case system select a case wherein a certain principle has been involved and endeavor to instruct the learner by having him discover the principle in the case. It would seem as though the case system were the better method of developing the students' discriminating ability and certainly ought to be made a part of the system of the well ordered school of law. This system is calculated not only not to develop the student into what is known commonly, as the case lawyer, but does the very opposite. The first eighteen pages of Professor Scott's work is given to a historical treatment of *quasi*-contract law, whereby the *quasi*-contract law of today is treated as "a natural, if unconscious development of the *quasi*-contract of the Roman law." To make clear this connection, the author has made frequent reference in the foot notes, to the Roman and Modern Civil Law of the Continent and Spanish American States. We certainly believe with the author that, the law of *quasi*-contract gains in importance and precision by treatment of it as a part of a large and well nigh universal system of law, the antiquity of which necessarily add to its dignity. The cases selected not only include

those of the New England and Atlantic states but a goodly number from the middle West as well as from Texas and the Pacific Coast. Many Eastern legal publications, of recent date, have been criticised because the cases selected have been Eastern decisions, other sections being almost if not entirely neglected. This is the kind of a work all young lawyers may read with great benefit, and relates to a class of contracts about which there is much to be learned by us all. The cases selected show a wise discrimination by a master of the subject. We unhesitatingly commend it. It is published in one volume of 772 pages, bound in buckram, by Baker, Voorhis & Company, of New York.

COMPILED STATUTES OF THE UNITED STATES.

This work is the supplement of 1905, and embraces the statutes of the United States of general and permanent nature enacted since March 4, 1901, and in force March 4, 1905. It incorporates under the headings of the revised statutes the subsequent laws, together with explanatory notes. It is compiled by Mr. John A. Mallory, assisted by members of the publisher's editorial staff. The previous work of the publishers is so well and favorably known that it would be useless for us to state more than that this supplement is intended to bring it up to date. In its make up this volume is fully up to the standard of the principal volumes. It has already found a place in a vast number of libraries because it is one of the necessities of a lawyer in active practice. The chronological table of laws included in the compiled statutes of the United States, 1901, and supplement 1905, being those acts passed subsequent to December 1, 1873, and prior to March 1, 1905, which are still in force; showing the volume and page of the statutes at large, and the pages and sections under which the acts will be found in these compilations. It is contained in 893 pages, and published by the West Publishing Co., St. Paul.

HUMOR OF THE LAW.

The author of the fourteenth amendment died the other day. In view of the tremendous amount of lucrative litigation that has sprung from his inspired production, it would seem but fair that the legal profession should erect a monument to his memory. Perhaps there are some persons who regret that he did not pass away fifty years ago.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. APPEAL AND ERROR—Abandonment.—Appellant held not able to defeat the supreme court's jurisdiction of an appeal by filing notice of abandonment in the trial court.—*In re* City of Seattle, Wash., 82 Pac. Rep. 740.

2. APPEAL AND ERROR—Final Decree.—Decree confirming report of commissioners in partition held not final for purpose of appeal, where plan was dependent on sale of part of the property, which had not taken place.—Clark v. Roller, U. S. S. C., 26 Sup. Ct. Rep. 141.

3. APPEAL AND ERROR—Former Adjudication.—Where the record of a judgment is before the court on appeal, the question of former adjudication is to be determined from the record unaided by presumption.—Guiling v. Washoe County Bank, Nev., 82 Pac. Rep. 800.

4. APPEAL AND ERROR—Judgment Appealable.—A judgment entered in the superior court by direction of the appellate court is appealable.—Lambert v. Bates, Cal., 82 Pac. Rep. 767.

5. APPEAL AND ERROR—Jurisdiction of Supreme Court.—Where a party fails to commence an action in the supreme court to reverse a judgment within a year after its rendition, the supreme court has no jurisdiction to review the same either by consent or by general appearance.—Wedd v. Gates, Okla., 82 Pac. Rep. 808.

6. APPEAL AND ERROR—Petition to Vacate Judgment of Supreme Court.—A proceeding by action or petition in the supreme court to obtain an order of such court vacating a judgment of the court, affirming an order of the trial court denying a new trial, will not lie.—Philbrook v. Newman, Cal., 82 Pac. Rep. 772.

7. APPEAL AND ERROR—Questions of Costs.—The supreme court will not entertain an appeal, after the main controversy has ceased, for the mere purpose of determining matters of costs.—Stevens v. Jones, Wash., 82 Pac. Rep. 754.

8. APPEAL AND ERROR—Record.—Where a case made contains no recitation to the effect that all of the evidence submitted upon the trial is included therein, this court will not consider any question which requires for its determination a consideration of such evidence.—Crossley v. Couch, Okla., 82 Pac. Rep. 881.

9. APPEARANCE—Service of Process.—A party does not waive the question of jurisdiction or validate a void judgment by a general appearance in support of a motion to set the judgment aside because of want of service.—Bennett v. Supreme Tent of Knights of Maccabees of the World, Wash., 82 Pac. Rep. 744.

10. BENEFIT SOCIETIES—Change of Beneficiary.—A member of a mutual benefit association cannot, when mentally incapacitated, change the beneficiary.—Sovereign Camp, Woodmen of the World v. Wood, Mo., 89 S. W. Rep. 891.

11. BOUNDARIES—Establishment.—The relative importance of calls in a survey for natural objects and marked lines and calls for courses and distances in case of a conflict stated.—Christenson v. Simmons, Oreg., 82 Pac. Rep. 805.

12. BOUNDARIES—Estoppel.—A person held not estopped by his conduct from insisting that a certain fence was in fact located on a highway.—Christenson v. Simmons, Oreg., 82 Pac. Rep. 805.

13. CANCELLATION OF INSTRUMENTS—Sufficiency of Complaint.—A complaint to set aside a conveyance because of mental incapacity and undue influence held sufficient as against objections raised for the first time on appeal.—Stohr v. Stohr, Cal., 82 Pac. Rep. 777.

14. CARRIERS—Concurring Negligence.—In an action

for injuries to a passenger, the carrier was liable if its negligence concurred with the acts of a fellow passenger, irrespective of whether the latter's act was negligence.—Missouri, K. & T. Ry. Co. of Texas v. Wolf, Tex., 89 S. W. Rep. 778.

15. CARRIERS — Damages for Misdirection by Ticket Agent.—A carrier held liable to a passenger for all damages proximately caused by a misdirection of its ticket agent, selling the passengers tickets as to the best route to their destination.—St. Louis & S. W. R Co. of Texas v. White, Tex., 89 S. W. Rep. 746.

16. COMMERCE — Intoxicating Liquors. — Exaction by state of license from persons selling intoxicating liquors within the state on a ferry boat employed in interstate commerce held authorized by Wilson Act Aug. 8, 1890, ch. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177].—Foppiano v. Speed, U. S. S. C., 26 Sup. Ct. Rep. 188.

17. CONSTITUTIONAL LAW—Licensing Milk Business.—Singling out milk business in the city as a proper subject of regulation does not deny equal protection of laws where all milk dealers are equally affected.—People of State of New York v. Van De Carr, U. S. S. C., 26 Sup. Ct. Rep. 144.

18. CONSTITUTIONAL LAW—Municipal Disposal of Garbage.—Municipal ordinances, requiring all garbage and refuse matter to be delivered at a specified crematory, held not wanting in the due process of law required by Const. U. S. Amend. 14, as taking private property for public use without compensation.—California Reduction Co. v. Sanitary Reduction Works of San Francisco, U. S. S. C., 26 Sup. Ct. Rep. 160.

19. CONTRACTS—Public Policy.—Public policy requires that a railroad should not contract for a consideration to locate a station at a certain point, without regard to the needs of the people and the public convenience.—Enid Right of Way & Townsite Co. v. Lile, Okla., 82 Pac. Rep. 810.

20. CRIMINAL LAW—Power of Supreme Court of Philippine Islands.—The Supreme Court of the Philippine Islands has jurisdiction, on appeal from a conviction in the trial court, to reverse the judgment and convict the accused of a higher degree of the offense charged.—Trono v. United States, U. S. S. C., 26 Sup. Ct. Rep. 121.

21. CRIMINAL EVIDENCE—Conspiracy. — A conspiracy to commit a crime may be shown by facts from which a conspiracy may be inferred.—State v. Sykes, Mo., 89 S. W. Rep. 851.

22. CRIMINAL EVIDENCE—Declarations of Third Persons.—In a prosecution for homicide, evidence that a night or two before the trial defendant's attorney and certain others had a conversation with witness about marrying defendant, etc., held inadmissible. — Lara v. State, Tex., 89 S. W. Rep. 840.

23. CRIMINAL EVIDENCE — Violation of Local Option Law.—In a prosecution for violating the local option law, refusal of the court to give a request to charge, presenting the theory that defendant was agent of the purchaser and not of the seller, held not error.—Carter v. State, Tex., 89 S. W. Rep. 835.

24. CRIMINAL EVIDENCE—Violation of Sunday Law.—In a prosecution of a liquor dealer for keeping open on Sunday, the state could prove by him that he was in the habit of violating the Sunday law. — Morris v. State, Tex., 89 S. W. Rep. 832.

25 CRIMINAL LAW—Time for Filing Bill of Exceptions.—The court has no authority to extend the time beyond that fixed by the statute for filing and serving a bill of exceptions or statement of facts in a criminal case.—State v. White, Wash., 82 Pac. Rep. 748.

26. DAMAGES—Pleading.—Where, in an action for killing a horse on a railroad track, plaintiff alleged that the market value of the horse was $500, admission of evidence that the horse had no market value, but that he had an intrinsic value for the special purposes, was error.—Gulf, C. & S. F. Ry. Co. v. Cooper, Tex., 89 S. W. Rep. 1001.

27. DEATH—Negligence.—In an action for death owing to the alleged negligence of defendant, in the absence of evidence it is to be presumed that deceased was in the exercise of due care.—Ryan v. St. Louis Transit Co., Mo., 89 S. W. Rep. 965.

28. DEEDS—Homestead.—In a suit by a grantor in a deed of trust to restrain a sale of his homestead, the payee of the note thereby secured held entitled to present a cross-action on the note, though amounting to less than $500.—Walker v. Woody, Tex., 89 S. W. Rep. 799.

29. DESCENT AND DISTRIBUTION—Action on Account.—In an action on an account for pasturage allotted to plaintiff on the partition of the estate of her deceased husband, plaintiff held liable for the husband's breach of contract of pasturage.—Hill v. Herndon, Tex., 89 S. W. Rep. 813.

30. DIVORCE—Death of Successful Party. — The executor of a decedent who died after procuring a decree for divorce has no authority to consent to the setting aside of the decree, nor to represent him in a proceeding to set it aside.—Dwyer v. Nolan, Wash., 82 Pac. Rep. 746.

31. ELECTIONS—Matters Reviewable. — Ballot boxes, containing the ballots, keys, and reports of election officers, are not judicial records such as may be reviewed by a writ of *certiorari*.—State v. Reynolds, Mo., 89 S. W. Rep. 877.

32. ELECTIONS—Nomination by Certificate.—The purposes of the statute concerning nominations by certificates are to permit independent nominations of candidates, and to facilitate the formation of new political parties.—Partridge v. Devoto, Cal., 82 Pac. Rep. 775.

33. EMINENT DOMAIN—Inconvenience and Annoyance to Adjoining Property Owner. — An adjoining property owner held entitled to recover from a railroad damages caused by noise, etc., resulting from blasting operations incident to construction of the road near his property.—Gossett v. Southern Ry. Co., Tenn., 89 S. W. Rep. 787.

34. EQUITY—Pleading New Matter.—Newly discovered defensive matter held properly pleaded, after decree, by supplemental bill in the nature of a bill of review.—Hardwick v. American Can Co., Tenn., 89 S. W. Rep. 785.

35. EVIDENCE—Bills and Notes.—In an action on certain notes acquired by plaintiff's intestate against the payee and indorser, evidence of intestate's declarations at the time he obtained the notes held admissible.—Bradley v. Bush, Cal., 82 Pac. Rep. 560.

36. EVIDENCE—Meaning of Terms in Fire Policy.—In an action on a fire insurance policy, held not error to permit an expert to define "fire," "ignition," "ignition point," the relation between "fire" and "flame," and kindred terms.—Sun Ins. Office v. Western Woolen Mill Co., Kan., 82 Pac. Rep. 513.

37. EVIDENCE—Parol Evidence as to Official Records.—An official whose actions the board of county commissioners had authority to control held competent to testify as to his instructions received from the board.—Phillips v. Welts, Wash., 89 Pac. Rep. 787.

38. EVIDENCE—Statements of Mortgagor.—A declaration made by a mortgagor of certain cattle to a witness, in the absence of assignees of a mortgage thereon, with reference to the cattle included therein, held inadmissible against such assignees.—Scott v. Lane County Bank, Tex., 89 S. W. Rep. 749.

39. EVIDENCE—Statutory Provision.—Statute making records of county clerk's office *prima facie* evidence of existence or nonexistence of license to practice medicine held not unconstitutional.—State v. Lawson, Wash., 82 Pac. Rep. 750.

40. EXECUTORS AND ADMINISTRATORS—Setting Aside Fraudulent Claim.—Under Rev. St. 1899, § 4278, an action to set aside a judgment allowing a claim against a decedent's estate for fraud must be brought within five years.—Fitzpatrick v. Stevens, Mo., 89 S. W. Rep. 897.

41. EXECUTORS AND ADMINISTRATORS—Suit Against Coexecutor.—A suit by an executor to set aside a conveyance and for a decree that the property belongs to the estate of decedent held maintainable against a coexecutor.—Stohr v. Stohr, Cal., 82 Pac. Rep. 777.

42. FEDERAL COURTS—Jurisdiction.—Jurisdiction of

civil case in which two or more defendants reside in different districts held conferred on the federal circuit court for either district, where requisite diversity of citizenship exists, by Act of March 2, 1887, ch. 315, § 4, 24 Stat. 442 [U. S. Comp. St. 1901, p. 345].—Petri v. F. E. Creelman Lumber Co., U. S. S. C., 26 Sup. Ct. Rep. 133.

43. FRAUDS, STATUTE OF—Debt of Another.—Where defendant, claiming to have purchased a cargo of coal and paid the consignor therefor, agreed to pay the carrier the freight due thereon in consideration of delivery, such contract was an original undertaking not within the statute of frauds. Civ. Code, §§ 1624, subd. 2, 2794.—Doe v. Allen, Cal., 82 Pac. Rep. 568.

44. GUARDIAN AND WARD—Appointment of Guardian.—Where the parents of certain minors were both dead, the paramount question in determining an issue of guardianship was the temporal, mental, and moral welfare of the minors, as provided by Civ. Code, § 246.—*In re* Dellow's Estate, Cal., 82 Pac. Rep. 558.

45. HABEAS CORPUS—To Test Sufficiency of Indictment.—Sufficiency of indictment in federal district court, [illegible] circuit court, cannot be tested by *habeas corpus* in the latter court on application of accused before he has been compelled to take any steps in the cause.—Riggins v. United States, U. S. S. C., 26 Sup. Ct. Rep. 147.

46. HOMESTEAD — Fraudulent Claim.—Where wife of debtor moves a few household goods into a dilapidated cabin on the debtor's land, the court must determine from all the circumstances whether her claim of homestead is made in good faith or not.—Gibbs v. Adams, Ark., 89 S. W. Rep. 1008.

47. HOMICIDE—Aiding and Abetting.—Where defendant was engaged in aiding and assisting in an unlawful assault on deceased at the time he was killed, it was immaterial whether the killing was the result of a shot fired by defendant, or by another, whom he was assisting.—State v. Crittenden, Mo., 89 S. W. Rep. 952.

48. HOMICIDE—Evidence as to Motive.—In a prosecution of defendant for murdering her husband, evidence of amorous conduct between defendant and L immediately prior and subsequent to the killing was admissible to establish a motive.—People v. Bowers, Cal., 82 Pac. Rep. 558.

49. HUSBAND AND WIFE—Community Property.—Community property held liable for a surety debt contracted by the husband for the benefit of a corporation in which he was a stockholder.—Floding v. Denholm, Wash., 82 Pac. Rep. 738.

50. INFANTS—Failure to Appoint Guardian Ad Litem.—Remedy of a minor heir for error in failing to appoint a guardian *ad litem* for him in proceedings to sell land for the payment of debts of his ancestor is by appeal and not by an action to set aside the sale.—Davidson v. Marcum, Ky., 89 S. W. Rep. 708.

51. IMPROVEMENTS,—Compensation on Vacation of Deed.—A grantee on vacation of the deed held entitled to recover the enhanced vendable value of the land by improvemements constructed by him in good faith.—Bell v. Bair, Ky., 89 S. W. Rep. 732.

52. INJUNCTION.—Pending Payment of Damages.—Equity will not enjoin, until damages are paid, the private erection of dam across navigable stream at suit of one claiming his land will be flooded unless dikes are raised around his land, and that his rights of navigation will be impaired, where construction authorized by legislature makes provisions for compensation.—Manigault v. Springs, U. S. S. C., 26 Sup. Ct. Rep. 127.

53. INJUNCTION—Restraining Breaches.—Where a seller of a business commits a breach of his agreement not to engage therein, a suit by the buyer for an injunction is the proper remedy.—W. S. Wolverton & Son v. Bruce & Butt, Ind. T., 89 S. W. Rep. 1018.

54. INTEREST—Unliquidated Demands.—Unliquidated demand of water company for value of water furnished to city held not to bar interest until institution of suit.—Harrodsburg Water Co. v. City of Harrodsburg, Ky., 89 S. W. Rep. 729.

55. INTOXICATING LIQUORS—Liability for Wrongful Sale.—A member of a firm engaged in the sale of spirituous liquors held individually liable for keeping his place of business open on Sunday.—Morris v. State, Tex., 89 S. W. Rep. 832.

56. INTOXICATING LIQUORS—Local Option.—Where the order putting local option into effect is not published for four successive weeks, the publication is insufficient to give effect to the law.—Johnson v. State, Tex., 89 S. W. Rep. 834.

57. INTOXICATING LIQUORS—Unlawful Sale.—In a prosecution for the unlawful sale of intoxicating liquors, facts held to justify an instruction that, if the transaction was a mere subterfuge to evade an unlawful sale, defendant was guilty.—Buckner v. State, Tex., 89 S. W. Rep. 829.

58. JUDGES—Care Required in Acceptance of Sureties.—The county judge in accepting sureties on a guardian's bond is liable to the ward for the exercise of ordinary care in determining the solvency of such sureties.—Commonwealth v. Lee, Ky., 89 S. W. Rep. 731.

59. JUDGMENT—Equitable Relief.—Equity will not interfere with a judgment at law on the mere ground that an accident prevented the losing party from pressing a motion for a new trial on technical errors which might be sufficient to warrant a reversal.—Noe v. Layton, Ark., 89 S. W. Rep. 1005.

60. JUDGMENT—Res Judicata.—Where an answer seeking affirmative relief against a codefendant is not served on the latter, a judgment granting the relief does not bar a subsequent suit in relation thereto.—Gulling v. Washoe County Bank, Nev., 82 Pac. Rep. 800.

61. LANDLORD AND TENANT—Landlord's Lien.—A finding that a landlord received certain money from his tenant with knowledge that it was the proceeds of cotton sold by the latter, on which the landlord had a lien, held to amount to a finding that the landlord had waived his lien, and was not entitled to possession as against the purchaser.—Noe v. Layton, Ark., 89 S. W. Rep. 1005.

62. MANDAMUS—To Compel Filing of Corporation Articles.—*Mandamus* will not be granted to compel the secretary of state to file articles of incorporation not entitled to be filed.—State v. Nichols, Wash., 82 Pac. Rep. 741.

63. MARINE INSURANCE—Deductions from Loss.—Under a marine insurance policy, held a deduction of a third was to be made from a claim for repairs necessitated by an accident two years after the date of the vessel's original custom house survey.—Providence-Washington Ins. Co. v. Paducah Towing Co., Ky., 89 S. W. Rep. 722.

64. MASTER AND SERVANT—Discharge from Employment.—Discharged employee, offered like employment upon like terms, held not entitled to recover damages.—Wolf Cigar Stores Co. v. Kramer, Tex., 89 S. W. Rep. 995.

65. MASTER AND SERVANT—Responsibility of Master.—Master held not relieved from liability to servants for negligent cutting of hole in a floor without placing guards around it, by reason of the fact that the negligence was that of an employee who disobeyed orders.—Day v. Emery-Bird-Thayer Dry Goods Co., Mo., 89 S. W. Rep. 903.

66. MUNICIPAL CORPORATIONS—Fire Escape Ordinance.—City ordinance requiring fire escapes on certain buildings held to apply to all buildings of the classes specified, whether erected before or after the passage of the ordinance.—City of Seattle v. Hinckley, Wash., 82 Pac. Rep. 747.

67. MUNICIPAL CORPORATIONS — Judicial Control of Ordinance.—A municipality when granting the right to furnish gas to inhabitants held to exercise ministerial or administrative powers subject to judicial control.—State v. Gates, Mo., 89 S. W. Rep. 881.

68. MUNICIPAL CORPORATIONS—Sanitary Regulations.—Adoption of ordinances granting exclusive privilege for 40 years to dispose of garbage held within authority of the supervisors of the city and county of San Francisco, under Const. Cal. 1879, art. 11, § 11, St. Cal. 1863, p. 540, and St. Cal. 1893, p. 288.—California Reduction Co. v.

Sanitary Reduction Works of San Francisco, U. S. S. C., 26 Sup. Ct. Rep. 100.

69. NAVIGABLE WATERS—Public Nuisance.—A bridge held a public nuisance, from which plaintiffs suffered an injury not common to the public at large, entitling them to maintain an action.—Viebahn v. Board of Comrs. of Crow Wing County, Minn., 104 N. W. Rep. 1089.

70. NAVIGABLE WATERS—State Obstruction.—Provision of state constitution, that navigable waters shall forever remain public highways, does not prevent the legislature, in order to drain low lands, to authorize construction of dam across navigable stream. — Manigault v Springs, U. S. S. C., 26 Sup. Ct. Rep. 127.

71. NAVIGABLE WATERS—Tide Lands.—Congress has power to grant tide land between high water and low-water mark adjoining a territory of the United States.—Kneeland v. Korter, Wash., 82 Pac. Rep. 608.

72. NAVIGABLE WATERS—Title to Bed of Stream.—The title to the bed of a navigable river in Nebraska is in the state, and the rights of a riparian proprietor on such stream are bounded by the banks of the river.—Kinkead v. Turgeon, Neb., 104 N. W. Rep. 1061.

73. NEGLIGENCE—Circumstantial Evidence. — Where negligence is sought to be proved by circumstantial evidence, the circumstances must be such as to reasonably lead up to and establish such negligence. — Missouri, K. & T. Ry. Co. v. Greenwood, Tex., 89 S. W. Rep. 810.

74. NEGLIGENCE—Habits of Person Injured. — In an action for personal injuries, question as to plaintiff's use of intoxicants some years prior to the accident held properly excluded.—Houston, E. & W. T. Ry. Co. v. McCarty, Tex., 89 S. W. Rep. 805.

75. NEGLIGENCE—Instructions as to Contributory Negligence.—In an action against a street railway company for injuries to a vehicle, an instruction authorizing recovery if the driver of the vehicle was "free" from contributory negligence was improper, and was inconsistent with an instruction defining what contributory negligence would defeat recovery.—Palmer Transfer Co. v. Paducah Ry. & Light Co., Ky , 89 S. W. Rep. 515.

76. NEW TRIAL—Surprise at Testimony Produced.—If a party is surprised by the testimony, he should ask for a continuance, and not rely on a motion for a new trial after verdict.—Renshaw v. Dignan, Iowa, 105 N. W. Rep. 209.

77. NEW TRIAL—Verdict Against Weight of Evidence. —That a verdict is not in accord with the testimony of a majority of the witnesses furnishes no reason for the trial court to set aside the verdict. — Louisville & N. R. Co. v. Helm, Ky., 89 S. W. Rep. 709.

78. NOTICE—Service by Mail.—Where a lease provided that in the event of a partial overflow of the leased lands the lessees should notify the lessor if they claim damages to the crop thereby, a notice sent by mail was sufficient.—Lacy Bros. & Kimball v. Morton, Ark., 89 S. W. Rep. 842.

79. PARTITION—Presumption of Death.—Where one of the heirs of an estate was presumed dead from absence, it would not be presumed that she died at any particular time within the seven years, so that any part of her interest passed by conveyances by her heirs or next of kin within such period.—Chapman v. Kullman, Mo., 89 S. W. Rep. 924.

80. PARTITION—Want of Administration.—Want of administration on the estate of one of the parties in interest who had been absent and unheard of for a period of 16 years, and was presumed dead, held no ground for denying partition, under Rev. St. 1899, § 4384.—Chapman v. Kullman, Mo., 89 S. W. Rep. 924.

81. PLEADING—Matters Arising after Commencement of Suit.—Where an answer setting up new matter is not served on a codefendant, he is not deemed to have denied such matter.—Gulling v. Washoe County Bank, Nev., 82 Pac. Rep. 800.

82. PRINCIPAL AND AGENT—Duty to Ascertain Authority of Agent.—All persons dealing with an agent are bound to ascertain the scope of the agent's authority, and if they do not they deal with him at their peril.—Moore v. Skyles, Mont., 82 Pac. Rep. 799.

83. PUBLIC LANDS—Findings of Land Department.—A second contest will not be entertained by the interior department against an entry of public lands on a charge which has once been investigated by the department.—Parryman v. Cunningham, Okla., 82 Pac. Rep. 822.

84. PUBLIC LANDS—Jurisdiction of Land Department. —Until title to public land passes from the United States to a homestead claimant, the land department has exclusive jurisdiction of the question of title. — Healey v. Forman, N. Dak., 105 N. W. Rep. 283.

85. QUIETING TITLE—Disclaimer.—Where a defendant in an action to quiet title to real estate desires to be discharged without costs, he must file an absolute and unqualified disclaimer to any title or interest in the land which is the subject-matter of the action.—Moore v. Wallace, Okla., 82 Pac. Rep. 825.

86. RAILROADS—Negligence.—Where the engineer of a railroad is guilty of negligence which results in injury to a mail clerk, both the engineer and the railroad are jointly liable for the injury, and may be sued jointly or severally —Illinois Cent. R. Co. v. Houchins, Ky., 89 S. W. Rep. 530.

87. RAPE—Proof of Subsequent Offenses.—In a prosecution for rape, similar acts occurring after the one charged in the indictment, should not be considered by the jury for any purpose.—Cecil v. Territory, Okla., 82 Pac. Rep. 654.

88. RECEIVERS—Sale of Perishable Property.—When, in a suit in equity, the title to personal property is of such character as renders sale thereof necessary, the court may properly appoint a receiver to make sale.—Nutter v. Brown, W. Va., 52 S. E. Rep. 88.

89. REMOVAL OF CAUSES—Joinder of Resident Defendants.—Where a petition for tort states a cause of action against a resident and a nonresident jointly, the latter is not entitled to remove the cause to the federal court.—Illinois Cent. R. Co. v. Houchins, Ky., 89 S. W. Rep. 530.

90. REPLEVIN—Service of Process.—If replevin is properly brought in the county where the property is wrongfully held by defendant agent, the summons may be issued and service may be had in another county on the agent's principal.—Central Nat. Bank v. Brooke, Kan., 82 Pac. Rep. 498.

91. SALES—Fraudulent Representations. — A vendee, led by fraudulent representations to purchase, cannot, on tender of rescission to the innocent vendor, recover the price, when such representations are inadmissible, because not made by vendor or his authorized agent.—Brounfield v. Denton, N. J., 61 Atl. Rep. 378.

92. SALES—Property Included.—Where a verbal contract for the sale of personal property is made, and a contest arises as to what property was included, it is competent to prove the price paid and the value of all the property claimed to have been purchased.—Dimmack v. Wheeling Traction Co., W. Va., 52 S. E. Rep. 101.

93. SALES—Reasonable Time for Delivery.—A contract for the sale of cattle, requiring delivery on a certain day or within a few days thereafter, expires within a reasonable time after the day specified.—Bell v. Hatfield, Ky., 89 S. W. Rep. 544.

94. SALES—Recovery for Deficiencies.—In an action on contract to recover for deficiency of goods sold from estimated quantity, the burden was on plaintiffs to establish the deficiency.—Reed v. McDonald, Cal., 82 Pac. Rep. 689.

95. SALES—Registration of Conditional Sale.—A promissory note or instrument in writing evidencing the conditional sale of personal property, when executed in the manner such instruments are authorized to be executed, need not be witnessed or acknowledged to entitle it to registration and to make it constructive notice when so filed.—Shafer v. National Cash Register Co., Okla., 82 Pac. Rep. 646.

96. SALES—Time as the Essence.—Time held to be of

the essence of a provision in a contract of sale that the seller should give notice of the shipment.—Steinhardt v. Bingham, N. Y., 75 N. E. Rep. 403.

97. SALES—Transfer of Title.—Where, by a contract of sale, anything remains to be done by the seller, such as weighing for the purpose of ascertaining the extent of the property and the amount of the purchase price to be paid, the purchaser cannot sue for possession.—Gibson v. Ray, Ky., 89 S. W. Rep. 474.

98. SALES—Waiver as to Time of Performance.—Strict performance of a contract for the sale of land as to time having been waived, the vendor's successors in interest were not entitled to cancel the same because of the vendee's failure to perform in time.—Hurd v. Fleck, Colo., 82 Pac. Rep. 485.

99. SHIPPING—Effect of Abandonment on Contract of Affreightment.—Justifiable abandonment of a vessel in consequence of dangers of the seas held a renunciation of the contract of affreightment, entitling the cargo owners to refuse to go on with the voyage.—The Eliza Lines, U. S. S. C., 26 Sup. Ct. Rep. 8.

100. SPECIFIC PERFORMANCE—Nature of Action.—An action to compel specific performance of an agreement to convey land is an action *in personam*, which can be tried wherever jurisdiction of the person of the defendant can be acquired.—Timma v. Timma, Kan., 82 Pac. Rep. 481.

101. STATUTES — Construction.—The rule that the expression of one thing in a statute is the exclusion of another will never be applied to defeat the plainly indicated purpose of the legislature.—Swick v. Coleman, Ill., 75 N. E. Rep. 807.

102. STATUTES—Construction.—The legal presumption is that the legislature did not intend to keep contradictory enactments in the statute book, or to repeal a law without expressing an intent so to do.—Wilson v. State, Fla., 39 So. Rep. 471.

103. STATUTES — Noncompliance with Formalities.—Noncompliance with formalities prescribed by general laws for introduction of private bills does not nullify act passed in disregard of such noncompliance.—Manigault v. Springs, U. S. S. C., 26 Sup. Ct. Rep. 127.

104. TAXATION—Refund of Illegal Taxes.—A suit will not lie by a taxpayer, on behalf of himself and other taxpayers, to recover back from the county illegal taxes paid to the county which the county has paid over to its creditors.—Hawkins v. Nicholas County, Ky., 89 S. W. Rep. 484.

105. TAXATION—Tax on Bank Stock.—A bank's claim for reimbursement for taxes paid on its stock for the benefit of its shareholders was an asset of the bank, which it was entitled to collect.—Kennedy v. Citizens' Nat. Bank, Iowa, 104 N. W. Rep 1021.

106. TENANCY IN COMMON—Adverse Possession.—A purchaser of land under a probate order holding under a conveyance purporting to convey the entire property held to have acquired the interest of an alleged tenant in common by adverse possession.—Payment v. Murphy, Mich., 104 N. W. Rep. 1111.

107. TRIAL—Validity of Verdict Rendered in Absence of Judge.—Judgment entered on a verdict is valid, though it was received by the clerk under a stipulation of the parties in the absence of the court.—Dubuc v. Lazell, Dalley & Co., N. Y., 75 N. E. Rep. 401.

108. TRUSTS—Title of Trustees.—Where a will devises land in trust for the purpose of sale, and division of proceeds among the trustees and other beneficiaries, the trustees take a joint title, and their separate interests as beneficiaries are not merged with their interest as trustees.—Burbach v. Burbach, Ill., 75 N. E. Rep. 519.

109. VENDOR AND PURCHASER — Failure to Execute Deed.—A vendor who failed to execute and tender a deed as required by the contract, held not entitled to interest on the contract price during the period that he remained so in default.—Consolidated Coal Co. v. Findley, Iowa, 105 N. W. Rep. 206.

110. WATERS AND WATER COURSES—Municipal Regulation of Water Charges.—A municipal corporation, independent of statute, has power to compel a private corporation furnishing water for public and private consumption to do so at reasonable rates.—Long Branch Commission v. Tintern Manor Water Co., N. J., 62 Atl. Rep. 474.

111. WATERS AND WATER COURSES — Title to Ice in Stream.—The right to take ice from a public stream, to fish therein, or to use the stream for boating, skating, and other sports, is the subject of reasonable legislative regulation.—Board of Park Commissioners of City of Des Moines v. Diamond Ice Co., Iowa, 105 N. W. Rep. 203.

112. WILLS—Ancillary Probate Proceedings.—On an application for ancillary probate of a foreign will, the property within the state is the *res* conferring jurisdiction; proof of the will being merely incidental to the disposal of such property.—*In re* Clark's Estate, Cal., 82 Pac. Rep. 760.

113. WILLS—Election by Widow.—The express assent of a wife to the terms of her husband's will, and the appropriation of personal property bequeathed to her use, held an election to abide by the will.—Sorenson v. Carey, Minn., 104 N. W. Rep. 958.

114. WILLS—Extra-Territorial Force.—A judgment admitting a will to probate is valid in other states only as to property within the jurisdiction of the court pronouncing the judgment.—*In re* Clark's Estate, Cal., 82 Pac. Rep. 760.

115. WILLS—Testamentary Capacity.—In proceedings to contest a will for want of testamentary capacity, evidence that many years before the will was executed testator stole small articles from his neighbors held inadmissible.—Graham v. Denterman, Ill., 75 N. E. Rep. 480.

116. WILLS—Trusts.—It is only when the language actually used by testator will admit of no other reasonable construction than that it creates an invalid trust that a court will declare such to be its effect.—*In re* Heywood's Estate, Cal., 82 Pac. Rep. 755.

118. WILLS—Widow Taking as an "Unmarried Daughter."—Widowed daughter of testator held an "unmarried" daughter, within the meaning of a clause of the will making a bequest to testator's unmarried daughters.—Trenton Trust & Safe Deposit Co. v. Armstrong, N. J., 62 Atl. Rep. 456.

119. WITNESSES—Fraudulent and Chattel Mortgage.—Where a chattel mortgage is attacked as fraudulent, the mortgagor can testify whether it was without consideration and given to delay creditors.—Allen v. Knutson, Minn., 104 N. W. Rep. 963.

120. WITNESSES — Husband and Wife.—In an action against a married woman, where the proceeding is adversary, her husband is not a competent witness against her.—Weckerly v. Taylor, Neb., 105 N. W. Rep. 254.

121. WITNESSES—Physician Using Skeleton in Demonstrating.—Where a physician testifies as to the injury to plaintiff's ankle, he may use a skeleton for the purpose of explaining the same to the jury.—Chicago & A. R. Co. v. Walker, Ill., 75 N. E. Rep. 520.

122. WITNESSES — Privileged Communications.—Communication by defendent to attorney on employment of attorney for defendant's brother held not privileged, under Code Civ. Proc. § 3178, subd. 2.—Mackel v. Bartlett, Mont., 82 Pac. Rep. 795.

123. WITNESSES — Privileged Communications. — The confessions of a wife, who joined in the commission of a crime with her husband, are not rendered admissible against the husband by the rule excluding privileged communication.—State v. Mann, Wash., 81 Pac. Rep. 561.

124. WITNESSES — Voluntary Appearance.—The fact that a person may voluntarily come from another state and without process appear and testify in court does not impair his competency as a witness, nor necessarily deprive his testimony of probative force.—Timma v. Timma, Kan., 82 Pac. Rep. 481.

125. WORK AND LABOR — Quantum Meruit.—Where a broker's contract for services in consideration of the formation of a partnership was valid, he could not recover on a *quantum meruit*, but only for breach of such contract.—Shropshire v. Adams, Tex., 89 S. W. Rep. 448.